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81-2153

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

IN RE:

WALTER FEINSTEIN, JASON I. GREEN, JACK KRIEGSMAN, LEO MILLER, and MORTON H. PASTOR,

Petitioners.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

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QUESTION PRESENTED

May a district court, sitting on an action which is thirteen years old, consistently refuse to determine by order whether the action is to be determined as a class action, and consistently refuse to either try the action or enter judgment so that an appeal might be prosecuted?

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Petitioners.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Petitioners respectfully pray that a writ of mandamus issue directing the Honorable William Matthew Byrne, Jr., District Judge, United States District Court for the Central District of California, to set a date certain for the commencement of jury trial and to determine by order whether this action is to be maintained as a class action. In the alternative, petitioners pray that a writ of mandamus issue directing the said Honorable William Matthew Byrne, Jr. to enter judgment so that an appeal may be prosecuted.

JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. § 1651 which provides:

> "The Supreme Court and all other courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

PROVISIONS OF LAW INVOLVED

Rule 1, Federal Rules of Civil Procedure

> *"Rule 1. Scope of Rules*
>
> "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 23(c)(1), Federal Rules of Civil Procedure

> "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

STATEMENT OF THE CASE

1. This is a private antitrust suit filed by five individual physicians on behalf of a class of physicians doing business in Southern California. The action was brought under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 25, to recover damages for and to secure injunctive relief against

defendants' violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.[1]

2. The complaint was filed on November 13, 1969. On January 10, 1970, plaintiffs timely filed their motion pursuant to Rule 23 of the Federal Rules of Civil Procedure for class determination. By March 30, 1970, all defendants had filed answers for the most part denying the material allegations of the complaint and asserting affirmatively that the action was, as a matter of law, barred by the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1015.

3. On September 1, 1970, defendants jointly moved the district court, on the basis of the *McCarran Act*, for partial summary judgment [dismissal] of all claims asserted in the complaint except "those based upon allegations of boycott, coercion or intimidation." Eleven months later, on August 2, 1971, the district court entered its order granting defendants' motion. In doing so, the district court held that, *as a matter of law*, the willful creation and maintenance of a monopoly in the insurance industry was exempt from prosecution under the federal antitrust laws; and held that agreements to fix prices for insurance were likewise exempt—even though such agreements were strictly condemned by applicable state law, and notwithstanding that the price fixing agreements had admittedly been effectuated by boycott and coercion. At the same time the district court denied plaintiffs' Rule 23 motion without prejudice.

---

[1]The parties defendant are: Nettleship Company of Los Angeles; Pacific Indemnity Company; Insurance Company of North America; Hardware Mutual Casualty Company; American Re-Insurance Company and North American Re-Insurance Corporation.

4. On January 10, 1972, the district court denied plaintiffs' alternative motion for reconsideration, entry of judgment pursuant to F.R.Civ.P. Rule 54(b) or certification pursuant to 28 U.S.C. § 1292(b). On December 11, 1973, defendant Nettleship dismissed its ten million dollar counterclaim against the named plaintiffs.

5. On July 25, 1974, plaintiffs again moved for class determination. The motion was denied by the district court without opinion in its minute order of December 9, 1974. Since the order of December 9, 1974 did not indicate the grounds for denial or state that the denial was with prejudice, plaintiffs, in order to perhaps more clearly comply with Local Rule 3(k) of the Rules of the United States District Court for the Central District of California, renewed their motion for class action determination on May 15, 1975, and, in connection therewith, provided the district court with a proper certified statement and affidavit of counsel showing the court the new and different facts upon which said motion was predicated, all of which had developed since the court's order of August 2, 1971 denying plaintiffs' Rule 23 motion without prejudice.

6. On March 25, 1974 discovery in this action closed pursuant to order of the district court. By December, 1974, plaintiffs had successfully resisted the last of defendants' procedural motions to dismiss, and announced ready for trial.

7. On June 9, 1975, fifteen months after discovery had been ordered closed, defendants filed their joint motion for summary judgment [dismissal] on all remaining issues. The

motion was taken under submission by the district court on June 26, 1975.

8. *Twenty-six months after submission* of defendants' joint motion for summary judgment, on August 31, 1977, the district court entered its opinion and order granting defendants' motion to dismiss the boycott, coercion and intimidation claims alleged in the complaint. The district court declined to rule on plaintiffs' motion for class action determination, stating, "In light of this dismissal, it is unnecessary to consider plaintiffs' motion to have the action maintained as a class action."

9. On September 28, 1977, petitioners timely filed their notice of appeal from the district court's judgment of August 31, 1977, and the orders of August 2, 1971 and August 24, 1977. On appeal, petitioners presented various questions of law for appellate determination, including, *inter alia*, the following:

> "Is the willful creation and maintenance of an insurance monopoly exempt from prosecution under the federal Antitrust laws?"
>
> "Are secret agreements between an insurance company and a medical association which require that in the absence of approval by the association, the insurance company refuse to sell policies of medical malpractice insurance to otherwise qualified physicians, immunized from prosecution as constituting an unreasonable restraint on the business of medicine and the business of insurance in violation of the Sherman Act, when it is admitted that the insurance company controls 98% of the medical malpractice insurance market in question; where it is established that medical malpractice insurance is a business necessity for physi-

cians; where said agreements are entered into for the purpose of allowing the association to control prices charged by individual physicians for medical services and where the agreements have the effect of creating and maintaining an insurance monopoly?"

"Are secret agreements between insurance companies to fix and control rates charged for insurance exempt from prosecution under the federal antitrust laws where such agreements are specifically prohibited by the law of the state in which they are made effective?"

10. On November 7, 1979 the court of appeals acted on its own motion to forestall determination of the questions presented on appeal and properly before it, and remanded the case to the district court "for reconsideration for a period of ninety-one days" [Appendix A].

11. After remand defendants below did nothing for over 60 days. Finally, on January 15, 1980, defendants filed a joint motion for "reaffirmance" of summary judgment with the district court.

12. On January 28, 1980, the court of appeals on its own motion and without notice extended remand for an additional 63 days [Appendix B].

13. On March 28, 1980, the district court filed a memorandum of opinion and order and, as pertinent, stated:

"This action is here on remand from the Ninth Circuit Court of Appeals by Order filed November 7, 1979. Pursuant to the Order of Remand, the Court hereby

vacates its entry on August 31, 1977 of partial summary judgment in favor of defendants . . .

• • • •

"The Court notes that this vacation of its judgment entered August 31, 1977 in no way disturbs its entry [sic] *on August 2, 1971 of partial summary judgment in favor of defendants as to* [certain of] *plaintiffs' claims* . . . Despite plaintiffs' purported appeal from the August 2, 1971 judgment via the filing of a nontimely notice of appeal on September 28, 1977, the [district] Court considers those issues decided therein as being finally determined and undisturbed by the Ninth Circuit's Order of Remand. The Order of Remand simply furnishes no basis for the conclusion that the matters resolved in the August 2, 1971 Order have now been thrown open for reconsideration. Furthermore, *St. Paul Fire & Marine Insurance Co. v. Barry*, 434 U.S. 919, 98 S.Ct. 2923 (1978), *provides no ground upon which plaintiffs may renew their class of claims relating to price-fixing and monopolization.*

• • • •

". . . the Court hereby requests the Ninth Circuit, upon receipt of this Order, to extend the period of remand for *sixty days from the date of receipt.*" (emphasis added).

14. On April 8, 1980, plaintiffs filed their request for an immediate hearing on appeal with the court of appeals and, in support thereof, recited in part as follows:

"In its Order of March 28, 1980, the District Court vacated its Order of August 31, 1977 granting partial summary judgment in favor of defendants-appellees and reaffirmed and did not "disturb" its Order of August 21, 1971 granting partial summary judgment in favor of defendants.

"At the hearing held on November 7, 1979, this Court specified that the entire action, including both Orders of Dismissal entered by the District Court, would be remanded to the District Court for reconsideration by the District Court in light of the decision of the Supreme Court in *St. Paul Fire & Marine Insurance Co. v. Barry*, 434 U.S. 919, 98 S.Ct. 2923 (1978), 54 L.Ed. 275 and so that the District Court might consider the contention of defendants-appellees that Orders of Dismissals were appropriate notwithstanding the decision in *St. Paul, supra.* [*Order*, November 7, 1980]

"The District Court has, in its Order of March 28, 1980, refused the invitation of this Court to review and/or reconsider its August 2, 1971 Order Granting Partial Summary Judgment in favor of defendants. The August 2, 1971 Order became a final and appealable Order on August 31, 1977, at which time the Court entered its final Order of Dismissal of the action. [Federal Rules of Civil Procedure, Rule 54(b)]. Appellants filed a timely Notice of Appeal from both the August 2, 1971 and August 31, 1977 Orders with this Court on September 28, 1977. A copy of said Notice of Appeal is attached hereto as Exhibit D.

"It has now been over ten years since appellants filed their complaint in the District Court. There has yet to be a trial. Defendants-Appellees have been granted three distinct and separate opportunities after the close of discovery to file a properly supported motion for summary judgment. They have yet to do so.

"In any event, the District Court has now directly stated that it has refused to reconsider or vacate

its August 2 1971 Order Granting Partial Summary Judgment in favor of defendants. The August 2, 1971 Order is final; an appeal therefrom has been properly taken and briefed to this Court; and the District Court will take no further action respecting the propriety of said Order. The August 2, 1971 Order involves only legal issues as to whether the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1013, exempts admitted monopoly and agreements to fix prices effectuated by boycott, coercion and intimidation from prosecution under the Sherman Act, 15 U.S.C. §§ 1, 2."

15. On May 20, 1980, the court of appeals filed its order denying the April 8, 1980 motion for an immediate hearing and said:

"The motion of plaintiffs-appellants Walter Feinstein, et al., for an immediate hearing by this Court, is denied." [Appendix C].

16. On June 19, 1980, the court of appeals extended remand for more than double the time requested by the district court on March 28, 1980, and stated:

"The remand to the district court is hereby extended by a period of 91 days from the date of the filing of this Order." [Appendix D].

17. Finally, on August 11, 1980, and within the period of remand, the district court filed its order granting in part and denying in part defendants' January 15, 1980 Motion for reaffirmance of summary judgment and, as pertinent here, stated:

"The matter having come before the Court and having been taken under submission, and the Court having considered the record and being fully advised, and

good cause appearing therefor, hereby ORDERS that defendants' motion for reaffirmance of summary judgment is DENIED, except as to the following issue: 'Whether defendants coerced plaintiffs into the purchase of other types of insurance from defendants as a condition precedent to the purchase of medical malpractice insurance from defendants.'"

18. In September, 1980, plaintiffs renoticed their May 15, 1975 Rule 23 motion for certification as a class action. The district court filed its notice of pre-trial conference and set pre-trial for November 3, 1980. On October 29, 1980, after completion by counsel of all pre-trial procedures contemplated by Local Rule 9 of the United States District Court for the Central District of California, counsel for the parties lodged their joint pre-trial conference order in the district court. After full briefing, petitioners' 1975 motion for class certification was taken under submission on October 27, 1980.

19. On November 3, 1980, the parties appeared for ruling on the class action motion and for pre-trial proceedings pursuant to the district court's order of September 2, 1980. Respecting petitioners' May 15, 1975, motion for class action certification, previously taken under submission by the district court on October 27, 1980 the district court announced:

> "THE COURT: Well, I suppose at long last the Court is faced with the necessity of giving its final and last ruling on the motion to certify under Rule 23, and it does appear to the Court that from the posture of the case it is appropriate to certify for class action treatment.

"Well, the Court makes all the usual findings as to the predominance of common issues and as to the appropriateness of making disposition by virtue of class action treatment.

"And it appears that the class should be defined as those Los Angeles physicians who purchased medical malpractice insurance from defendants between the years 1963 and 1970.

"Other than what has been articulated, or expressed, in the past in regard to class action certification, or all other considerations under Rule 23, is there anything further to be added either in support of application for class action certification or in opposition thereto?

"Very well. The order will be as just articulated by the court."

20. On February 2, 1981, the parties again appeared before the district court and the court again addressed the question of class certification:

"We are probably at the point in this case where the Court should make its order certifying the class. . . .

"The aspect of the case which perhaps presents some confusion is whether the likely evidence in intimidation looks like price-fixing evidence, and it probably will look like price-fixing evidence, but it seems to the Court that it is, nevertheless, evidence that comes into the case if only, and not only on the issue of damages, but with respect to the class which the Court contemplates certifying, and that is, those Los Angeles physicians and surgeons who purchased medical malpractice insurance from defendants between the years 1963 and 1970.

"The Court is satisfied that there are the necessary circumstances of numerosity, common questions of law and fact, typically, adequacy of representation—all of those things seem to be present so far as it is necessary for the Court to make a finding to that effect.

"And that is, that those matters predominate over the separate issues, and the Court makes such a finding."

21. In late March and early April, 1981, defendants below *again* filed motions for summary judgment, those motions were based on the same facts and law previously rejected by the district court in connection with its August 11, 1980 denial of summary judgment. By May 27, 1981, plaintiffs had served and filed their oppositions to each said motion and had requested sanctions pursuant to F.R.Civ. P. Rule 56(g).

22. On May 20, 1981, the Honorable Robert J. Kelleher, District Judge, recused himself *sua sponte* on the ground that his son had "joined the law firm of Gibson, Dunn & Crutcher, which is involved in this matter."

23. On May 29, 1981, this case was assigned to the Honorable William Matthew Byrne, Jr., District Judge, pursuant to 28 U.S.C. § 137.

24. On June 19, 1981, the District Court found that, notwithstanding the rulings made by Judge Kelleher on November 3, 1981 and February 2, 1981, petitioners' May 19, 1975 motion for class certification was "still pending." At the same time, the District Court found, *sua sponte,* that remand had "expired"; overruled petitioners' objections to further delay; and ordered that petitioners join in a request for a further extension of remand.

25. On July 8, 1981, plaintiffs filed their petition for writ of mandamus to the Honorable William Matthew Byrne, Jr., United States District Court, Central District of California, and for Other Relief [No. 81-7434], and asked that the court of appeals enter certain orders and grant certain relief as follows:

"To: Circuit Judges Chambers, Anderson and Schroeder:

"Petitioners hereby petition this Honorable Court for a Writ of Mandamus directing the Honorable William Matthew Byrne, Jr., to:

"1. Set a trial date;

"2. Reconsider and either vacate or affirm the Order of August 2, 1971 granting defendants' Motion for Partial Summary Judgment;

"3. Enter a written order granting petitioners' May 15, 1975 Motion for Class Certification.

"In the alternative, petitioners respectfully request that, pursuant to the appeal pending before this Court in No. 77-3998, and the November 7, 1979 Order of Remand entered therein, this Court itself schedule an immediate hearing so that the following matters might be considered:

"1. Whether this Court should now act to consider and either reverse or affirm the District Court's Order of August 2, 1971 granting partial summary judgment in favor of defendants.

"2. Whether this Court should now act to clarify the scope and extent of its November 7, 1979 Order of Remand for the guidance of the District Court and the parties below.

"3. Whether this Court should now itself act to establish a date by which the District Court must rule

on petitioners' May 19, 1975 Motion for Class Action Certification.

"4. Whether this Court should now itself act to specify a date certain for the commencement of jury trial in the District Court."

26. On or about July 20, 1981, defendants below filed what they styled as a "Joint Request of the Parties for Extension of Remand." Plaintiffs' "joinder" in said request was commanded by the June 19, 1980 instruction and order of the district court.

27. On August 21, 1981, the court of appeals denied petitioners' July 8, 1981 petition for a writ of mandamus and again, over plaintiffs' objection, extended remand for a further period of 120 days. [Appendix E].

28. On December 19, 1981, or, at the latest, December 21, 1981 [*F.R.Civ.P.*, Rule 6], the period of remand extended and provided by court of appeals expired, and the district court was thereafter without jurisdiction over this action.

29. On January 11, 1982, counsel for plaintiffs received a document styled "Civil Minutes-General" dated December 24, 1981 from O'Melveny & Myers which same states:

"Court grants defendants' Motion [sic] for Summary Judgment. Court to issue Memorandum and Findings."

30. On January 29, 1982, plaintiffs filed another petition for writ of mandamus with the court of appeals, noted that the district court had failed to act within the period of remand provided by the order of August 21, 1981; and, asked that the district court be ordered to act. In the alternative, petitioners requested a hearing on and an appellate determination of the monopoly questions decided in the

district court's order of August 2, 1971, and presented in petitioners' original 1977 appeal.

31. On March 2, 1982, the court of appeals denied petitioners' January 29, 1982 petition for writ of mandamus, and, again, on its own motion, extended remand for an additional thirty days. [Appendix F].

32. On April 7, 1982, the district court having continued in its refusal to act, plaintiffs applied to the court of appeals for a writ of mandamus and asked that the district court be ordered to set a date certain for trial.

33. On May 4, 1982, the court of appeals denied plaintiffs' April 7, 1982 petition for writ of mandamus and acted on its own motion to again extend remand for an additional fifty-six days. [Appendix G].

34. Petitioners have to date not been served with or received any "Memorandum and Findings" authored or entered by the district court, nor have they received any notice that the December 24, 1981 "Civil Minutes-General" has been filed. Petitioners have not received any notice that the district court has entered judgment or taken *any* other action in this case. They have simply heard nothing from the respondent district court.

REASONS FOR GRANTING THE WRIT

This case is almost thirteen years old. There has been no trial. There has been no hearing on appeal, nor any appellate affirmation or reversal of the orders of dismissal entered by the district court. Almost five full years have elapsed since judgment was entered. Two and one-half years have gone by since the court of appeals filed its

November, 1979 "ninety-one" day order of remand. Contrary to the requirements of Rule 23 of the Federal Rules of Civil Procedure the respondent district court judge has refused to consider the question of class certification, and has refused to determine whether this action will be maintained as a class action.

The respondent district court has never stated any reason for its continuing refusal to act. The court of appeals has never stated any reason for its continued *sua sponte* extension of remand. In fact, the district court has not since March, 1980—over two years ago—made any request for an extension of remand; nor has it indicated that it requires additional time to properly take action. It may never act. The court of appeals refuses to either order action or set a limit on delay, and itself fails to state any reason for its refusal.

The district court's continued refusal to act and the circuit court's acquiescence in that refusal makes a mockery of justice as it is conceived in these United States. Rule 1 of the Federal Rules has been violated to the point of scandal, and to the point of allowing defendants to emerge from this litigation as winners, notwithstanding any judgment they may eventually be required to pay. Not so with petitioners, several of whom have been forced to retire, and one of whom is, as the district court was long ago advised, in extremely poor health.

This is an extraordinary case, involving continual and indefensible delay and inaction by both the district court and the court of appeals. The writ of mandamus has traditionally been used in the federal courts to compel an in-

ferior court to exercise its authority when it is its duty to do so, *Kerr v. United States District Court*, 426 U.S. 402 (1976); *United States Dept. of Energy v. Crocker*, 629 F.2d 1321 (9th Cir. 1980). Indeed, this Court has specifically found it appropriate to use mandamus to regulate a trial court's schedule, where the trial court's failure to act expeditiously would prejudice an interested party. See *Connor v. Coleman*, 440 U.S. 612 (1979).

Petitioners have a right to be heard. They have a right to either proceed to trial or obtain appellate review.[3] They have effectively been denied each of these rights, and have no remedy except that this Court may grant their petition.

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[3]One question of law involved in this case, *viz*, whether Congress has, through the *McCarran Act*, extended carte blanche to those who unlawfully monopolize the business of insurance, is one of great public importance. Other than the court below, no court has ever held that a private monopoly of the business of insurance is exempt from the federal antitrust laws. The national implications of the monopoly question presented would, especially in view of the district court's continuing refusal to act, and the circuit court's refusal to hear the appeal before it, fully justify issuance of a writ of certiorari to review this case without waiting for judgment to be given by the court of appeals.

CONCLUSION

For the reasons stated, petitioners respectfully request that the writ prayed for herein be granted.

Dated: May 21, 1982

Respectfully submitted,

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JOSEPH M. ALIOTO
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Attorneys for Petitioners

(Appendices follow)

Appendix A

In the United States Court of Appeals
For the Ninth Circuit

No. 77-3998
DC No. CV 69-2301

Walter Feinstein, Jason I. Green, Jack Kriegsman, Leo Miller and Morton H. Pastor,
Plaintiffs and Appellants,

vs.

Nettleship Company of Los Angeles, Pacific Indemnity Company, Insurance Company of North America, Hardware Mutual Casualty Company, American Re-Insurance Company and North American Re-Insurance Corporation,
Defendants and Appellees.

ORDER OF REMAND

[Filed Nov. 7, 1979]

Before: CHAMBERS, ANDERSON and SCHROEDER, Circuit Judges.

The case is remanded to the district court for reconsideration for a period of ninety-one days. Remand is prompted by the intervening decision of *St. Paul Fire & Marine Insurance Co. v. Barry*, 434 U.S. 919, 98 S.Ct. 391, 54 L.Ed. 2d 275.

It is suggested that the district court lift its final judgment before reconsidering the case. It is observed that appellees maintain that the decision below may be sustained on other grounds than *Addrisi v. Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), overruled by *St. Paul Fire & Marine, supra.*

On any appeal from a new final judgment, records and briefs from this case may be transferred on motion or stipulation to the new numbered appeal. The existing panel of this court is to have any new appeal concerning the case below.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 77-3998

Walter Feinstein, Jason I. Green, Jack Kriegsman, Leo Miller and Morton H. Pastor,
Plaintiffs and Appellants,

vs.

Nettleship Company of Los Angeles, Pacific Indemnity Company, Insurance Company of North America, Hardware Mutual Casualty Company, American Re-Insurance Company and North American Re-Insurance Corporation,
Defendants and Appellees.

ORDER EXTENDING REMAND

[Filed Jan. 28, 1980]

Before: CHAMBERS, ANDERSON and SCHROEDER, Circuit Judges.

The remand to the district court is hereby extended by a period of 63 days from the date of the filing of this order.

Appendix C

United States Court of Appeals
For the Ninth Circuit

No. 77-3998

Walter Feinstein, et al.,
Plaintiffs-Appellants,

vs.

Nettleship Co. of Los Angeles, et al.,
Defendants-Appellees.

ORDER DENYING MOTION FOR IMMEDIATE HEARING

[Filed May 20, 1980]

Before: CHAMBERS, ANDERSON and SCHROEDER, Circuit Judges.

The motion of plaintiffs-appellants Walter Feinstein, et al., for an immediate hearing by this Court, is denied.

Appendix D

United States Court of Appeals
For the Ninth Circuit

No. 77-3998

Walter Feinstein, Jason I. Green, Jack Kriegsman, Leo Miller and Morton H. Pastor,
Plaintiffs and Appellants,

vs.

Nettleship Company of Los Angeles, Pacific Indemnity Company, Insurance Company of North America, Hardware Mutual Casualty Company, American Re-Insurance Company, and North American Re-Insurance Corporation,
Defendants and Appellees.

ORDER EXTENDING REMAND

[Filed June 19, 1980]

Before: CHAMBERS, ANDERSON and SCHROEDER, Circuit Judges.

The remand to the district court is hereby extended by a period of 91 days from the date of the filing of this order.

Appendix E

United States Court of Appeals
For the Ninth Circuit

No. 77-3998
D.C. No. CV 69-2301 RJK

Walter Feinstein, et al.,
Plaintiffs and Appellants,

vs.

Nettleship Company of Los Angeles, et al.,
Defendants and Appellees.

No. 81-7434

Walter Feinstein, et al.,
Petitioners,

vs.

United States District Court for the
Central District of California,
Respondent,
and
Nettleship Company of Los Angeles, et al.,
Defendants-Real Parties In Interest

ORDER GRANTING EXTENSION OF REMAND AND DENYING WRIT OF MANDAMUS

[Filed Aug. 21, 1981]

Before: CHAMBERS, ANDERSON and SCHROEDER, Circuit Judges.

The joint motion of the parties for an extension of the remand, in this limited remand case, is granted. The court grants an extension of time nunc pro tunc from the expiration of the last extension until the date of the filing of this order. The court also grants a further extension of 120 days from the date of the filing of this order.

Should the district judge determine that issues remain to be tried, and does not certify an interlocutory appeal or an appeal under Rule 54(b), FR Civ P, the parties shall so notify this court so as to permit the dismissal of the instant appeal.

Should the district judge grant an interlocutory appeal or an appeal under Rule 54(b), or if he shall determine that all remaining issues should be dismissed or summary judgment granted in favor of the defendants, the parties shall so notify this court so as to permit the present appeal to be resubmitted to the panel.

We have no intent by this order to tell the district judge how he should proceed on the issues and we leave to him any decisions about interlocutory appeals or Rule 54(b) appeals. Our only intent is to clarify the procedural status of the case in terms of the limited remand.

The plaintiffs'-appellants' motion for a writ of mandamus (No. 81-7434) is denied.

Appendix F

United States Court of Appeals
For the Ninth Circuit

No. 77-3998
DC No. CV-69-2301-WMB
Central California

Walter Feinstein, et al.,
Plaintiffs-Appellants,

vs.

Nettleship Company of Los Angeles, et al.,
Defendants-Appellees.

No. 82-7056

Walter Feinstein, et al.,
Petitioners,

vs.

United States District Court for the
Central District of California,
Respondent,
and
Nettleship Company of Los Angeles, et al.,
Real Parties in Interest.

ORDER GRANTING EXTENSION OF TIME AND DENYING WRIT OF MANDAMUS

[Filed Mar. 2, 1982]

Before: CHAMBERS, ANDERSON and SCHROEDER, Circuit Judges.

The court on its own motion, in this limited remand case (No. 77-3998), grants an extension of time of the remand nunc pro tunc from the expiration of the last remand until the date of entry of this order. The court also grants a further extension of thirty (30) days from the date of entry of this order.

The petition for a writ of mandamus (No. 82-7056) is denied.

Appendix G

United States Court of Appeals
For the Ninth Circuit

No. 77-3998
DC# CV-69-2301 WMB
Central California

Walter Feinstein, et al.,
Plaintiffs-Appellants,

vs.

Nettleship Company of Los Angeles, et al.,
Defendants-Appellees.

No. 82-7205

Walter Feinstein, et al.,
Petitioners,

vs.

United States District Court for the
Central District of California,
Respondent,
and
Nettleship Co. of Los Angeles, et al.,
Real Parties in Interest.

ORDER

[Filed May 4, 1982]

Before: CHAMBERS, ANDERSON and SCHROEDER, Circuit Judges:

The court on its own motion, in this limited remand case (77-3998), grants an extension of time of the remand nunc pro tunc from the expiration of the last remand until the date of entry of this order. The court also grants a further extension of fifty-six (56) days from the date of entry of this order.

The petition for a writ of mandamus (No. 82-7205) is denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

IN RE

WALTER FEINSTEIN, JASON I. GREEN, JACK KRIEGSMAN, LEO MILLER, AND MORTON H. PASTOR,

Petitioners

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

RESPONDENTS' BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

The petition for a writ of mandamus is directed to the district court's routine management of its workload in an action pending before it. Petitioners seek an order from this Court directing the district court either to set a date for jury trial of petitioners' civil antitrust action, or enter a judgment therein from which an appeal may be taken. By minute order of December 24, 1981, the district court has granted respondents' motions for summary judgment in the action, stating "Court to issue Memorandum and Findings" (Pet., p. 14). The petition is based upon no more than petitioners' unwillingness to await the district court's orderly preparation of its memorandum and findings.[1]

We respectfully submit that the respondent court's regulation of its calendar, which is a matter committed to

[1] The instant petition is the *fourth* request for extraordinary relief by petitioners since December 24, 1981: petitioners sought similar

its discretion, is in full compliance with the Federal Rules of Civil Procedure and that, in any event, there is no basis for extraordinary review by mandamus of the district court's actions.

STATEMENT OF THE CASE

Petitioners are five medical doctors who are plaintiffs in *Feinstein, et al., v. Nettleship, et al.,* pending in the Central District of California. Petitioners allege that a group insurance program of the Los Angeles County Medical Association violated the antitrust laws. Respondents, defendants in the district court, are the insurance brokerage firm that acted as underwriting manager for the program, one of the carriers, and four reinsurers.[2]

In 1977, the district court granted summary judgment in favor of respondents in reliance upon a Ninth Circuit decision[3] which had limited the scope of the "boycott" exception in § 3(b) of the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. §§ 1011-1015, to activity against insurance companies or agents. Petitioners appealed to the Ninth Circuit. While that appeal was pending, this Court overruled *Addrisi* and held that policyholders may also be included in the §3(b) exception. *St. Paul Fire & Marine Ins. Co.* v. *Barry,* 438 U.S. 531 (1978).

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relief in petitions for writs of mandamus filed in the United States Court of Appeals for the Ninth Circuit on January 29, 1982 and on April 7, 1982, both of which were denied (Pet., pp. 14-15), and in a petition for writ of certiorari lodged in this Court on May 12, 1982, which was later withdrawn.

[2] Respondents are The Nettleship Co. of Los Angeles, Pacific Indemnity Company, Insurance Company of North America, American Re-Insurance Company, North American Reinsurance Corporation, and Sentry Insurance A Mutual Company. A list of respondents' subsidiaries and affiliates pursuant to Rule 28.1 is contained in Appendix A attached hereto.

[3] *Addrisi* v. *Equitable Life Assurance Society of U.S.,* 503 F.2d 725 (9th Cir. 1974), certiorari denied, 420 U.S. 929 (1975).

In November 1979, following oral argument on the appeal in the case at bar, the Ninth Circuit remanded the case to the district court for reconsideration for a period of 91 days. The remand order stated that it was prompted by this Court's decision in *Barry*, overruling *Addrisi*, but also noted respondents' position that the judgment was sustainable on grounds other than *Addrisi* (Pet.Appx., pp. A-1 to A-2).[4]

Following remand, respondents in January 1980 moved the district court to reaffirm the summary judgment on grounds other than *Addrisi*. The district court vacated its final judgment, directed the filing of further briefs and supporting material, and requested the Ninth Circuit to extend the period of remand for another 60 days.[5]

In August 1980, the district court granted in part and denied in part respondents' motion for reaffirmance of the summary judgment. Petitioners then filed a motion for class certification.[6] The petition (pp. 10-12) quotes *only part* of the transcript of the proceedings in the district court in

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[4] The remand order also stated:

"It is suggested that the district court lift its final judgment before reconsidering the case. • • •

"On any appeal from a new final judgment, records and briefs from this case may be transferred on motion or stipulation to the new numbered appeal. The existing panel of this court is to have any new appeal concerning the case below" (Pet.Appx., p. A-2).

[5] In June 1980, the Ninth Circuit extended the remand to September 18, 1980 (Pet., p. 9), and has ordered further extensions from time to time, most recently to June 29, 1982 by an order dated May 4, 1982 (Pet.Appx. G).

[6] The petition itself shows the falsity of petitioners' assertion (Pet., p. i) that the district court has "consistently refuse[d]" to consider the question of class certification. The district court denied without prejudice a motion for class certification in August 1971 (Pet., p. 3); a second motion was denied December 9, 1974 (*id.*, p. 4); petitioners' third motion for class certification was filed in May 1975 (*id.*, p. 10) and was submitted with the summary judgment motion which led to the 1977 judgment dismissing the action. The trial court, in light of dismissal of the action, did not consider the third class action motion.

connection with the class certification motion. On November 3, 1980, the court indicated initially that a class would be certified, but after further argument deferred making any order until after petitioners had filed a particularized statement of the evidence upon which they intended to rely on the issues of boycott, coercion and intimidation (November 3, 1980 Transcript, pp. 25-28). At further hearing on February 2, 1981, the court again referred to a contemplated class certification (Pet., p. 15), but found: "that there is just noncompliance by the [petitioners] with the orders of the Court or at least the articulated requirements of the Court" with regard to petitioners' delineation of the evidence (February 2, 1981 Transcript, pp. 14 and 36). The court accordingly ordered a further particularization of petitioners' evidence and deferred ruling on the request for class certification. (*id.*, p. 48).

Petitioners' statement of evidence in response to the last order suggested lack of genuine issues of fact and respondents moved for summary judgment. Before the motions were fully briefed, however, Judge Kelleher recused himself because his son had joined a law firm representing one of the respondents. On May 29, 1981 the case was assigned to Judge Byrne. In June, Judge Byrne ruled that petitioners' most recent motion for class certification had not been determined by Judge Kelleher and was before him (June 19, 1980 Transcript, p. 7). Petitioners thereupon filed a petition for mandamus with the Ninth Circuit claiming, *inter alia*, that the district court should be directed to set a trial date and to grant the motion for class certification or, in the alternative, that the Ninth Circuit should schedule an immediate hearing (Pet., pp. 13-14). The petition was denied (Pet.Appx., p. A-7).

Respondents' motions for summary judgment were argued November 6, 1981 and, as noted, resulted in the December 24 order that summary judgment would be granted with memorandum and findings to be issued. Petitioners then, on January 29 and again on April 7,

1982, sought mandamus from the Ninth Circuit asking, *inter alia,* that the district court be ordered to act. (The April 7 petition asked that the district court be ordered to set a date certain for trial (Pet., p. 15).) Those petitions were denied on March 2, 1982 and May 4, 1982, with the Ninth Circuit on each occasion extending the time of the remand. The latest extension will expire June 29, 1982 (Pet. Appx. G).

REASONS WHY THE WRIT SHOULD BE DENIED

The case presents none of the "exceptional circumstances" warranting exercise of the Court's discretionary powers under Rule 26. When the district court's memorandum and findings are issued, judgment can be entered from which petitioners may take an appeal. In the meantime, petitioners are in exactly the same position as any party to a suit which has been argued and submitted but not yet decided. [7]

Petitioners erroneously assert that the district court has not since March 1980 made any request to the Ninth Circuit for an extension of its remand, and that the district court "may never act" (Pet., p. 16). There is absolutely no foundation in this record for those assertions. The petition itself shows that in June 1981 the district court, concerned with the possible expiration of the period of remand, ordered the parties to join in a request to the Ninth Circuit for a further extension (Pet., p. 12). The Ninth Circuit, through the multiple petitions filed by petitioners herein, is obviously cognizant of the passage of time in the case; there is no reason to speculate

[7] Petitioners, who here complain of the time required to prepare the district court's memorandum and findings, did not facilitate that process. In opposition to respondents' summary judgment motions, petitioners did not identify specific evidence bearing on specific factual issues. Instead, they purported to rely generally upon all their evidence, consisting of 1176 exhibits, 1257 pages of deposition testimony and numerous memoranda filed over a number of years.

that entry of judgment will be unreasonably delayed by the district court.

The record is equally devoid of support for the notion (Pet., p. 15) that there has been no "hearing" on petitioners' appeal. The Ninth Circuit's order remanding the case for reconsideration in light of *Barry* was made after oral argument on the appeal. As a result of that remand, the district court vacated its 1977 judgment against petitioners. The further assertion that the district court has refused to consider the question of class certification has already been answered (see pp. 3-4, *supra,* n. 6). The class certification question was further considered during the pretrial proceedings on November 3, 1980 and February 2, 1981 (see Pet., pp. 10-12). Judge Kelleher deferred ruling then because petitioners had failed to comply with his requirement of a particularized statement of their evidence. Judge Byrne's subsequent granting of respondents' motions for summary judgment made unnecessary further consideration of the class certification question.

In any event, we submit that an extraordinary writ by this Court is neither necessary nor appropriate to fix the time within which the district court must issue its memorandum and findings after granting the motions for summary judgment.

In *Kerr* v. *United States District Court,* 426 U.S. 394, 402 (1976), relied upon by petitioners (Pet., p. 17), the Court noted the remedy of mandamus is a "drastic one" and pointed out that "the fact still remains that 'only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy' " (426 U.S. at 402, quoting *Will* v. *United States,* 389 U.S. 90, 95 (1967)). The case at bar wholly lacks those elements of public importance and exceptional character so as to call for the exercise of this Court's discretion to issue the writ (*see, e.g., Ex Parte Peru,* 318 U.S. 578, 585-586 (1943)).

This is not a case where the district court has exceeded or refused to exercise its jurisdiction. Here, the most that could be claimed is that the district court is slow in issuing an opinion, albeit it has not exceeded the time contemplated by the Ninth Circuit.[8]

Petitioners must satisfy " 'the burden of showing that [their] right to issuance of the writ is "clear and indisputable." ' " *Kerr* v. *United States District Court, supra,* 426 U.S. at 403, quoting *Bankers Life & Cas. Co.* v. *Holland,* 346 U.S. 379, 384 (1953); and *see, Will* v. *United States, supra,* 389 U.S. at 96. The instant petition falls far short of this mark.

[8] Petitioners erroneously rely (Pet., p. 17) on *Connor* v. *Coleman,* 440 U.S. 612 (1979), which was before this Court for the *eighth* time, after the district court chose to ignore this Court's directive, issued 22 months previously, that it resolve expeditiously the apportionment controversy for the State of Mississippi (440 U.S. at 614 (dissenting opinion of Justice Marshall)). Nothing in the case at bar is even remotely comparable to the persistent disregard of appellate court orders present in *Connor.*

CONCLUSION

For the foregoing reasons the Court should deny the petition for writ of mandamus.

Respectfully submitted,

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June 1982.

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APPENDIX A

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Pursuant to Rule 28.1 of this Court's Rules, respondents provide the following information regarding their parent companies, subsidiaries and affiliates:

Pacific Indemnity Company

Pacific Indemnity Company has no subsidiaries other than wholly-owned subsidiaries and no affiliates. Ninety-nine percent (99%) of the stock of Pacific Indemnity Company is owned by Federal Insurance Company which is in turn a wholly-owned subsidiary of The Chubb Corporation. The following companies are subsidiaries (excluding wholly-owned subsidiaries) or affiliates of Federal Insurance Company or The Chubb Corporation: The Touchette Corp. (New York); Intremex, S.A. (Mexico); Latin American Reinsurance Services Ltd. (Bermuda); Hartley Cooper (Holdings) Limited of London (Great Britain); La Federacion Compania de Seguros, C.A. (Venezuela); Chubb Lloyd's Ins. Co. of Texas (Texas); Seguros "Illimani" S.A. (Bolivia); Chubb Life Insurance Co. of America (New Hampshire); UPA, Inc. (New Jersey); Bolivar Compania de Seguros del Ecuador (Ecuador); La Federation Europeenne Compagnie d'Assurance, S.A. (Belgium); Chubb Syndicate Inc. (New York); Frank B. Hall (N.Y.I.E.), Inc. (Delaware); J&H, WF Syndicate A (New York); La Federacion Compania de Seguros, S.A. (Colombia); Chubb do Brasil (Brazil); DHC Corp. (Delaware); Argos Companhia de Seguros (Brazil); and Associated Aviation Inc. (New York).

Insurance Company of North America

Insurance Company of North America is a wholly-owned subsidiary of INA Financial Corporation, a wholly-owned subsidiary of INA Corporation which in turn is a wholly-owned subsidiary of CIGNA Corporation.

Insurance Company of North America's subsidiaries (except thirty-three (33) wholly-owned subsidiaries) and affiliates (see 26 U.S.C. Sections 1501, 1502, 1504; Treas. Reg. Section 1.1502.1) are: Compagnie d'Assurances Colina S.A. (Ivory Coast); Compagnie Financiere INA (France); Compagnie Nouvelle d'Assurances (France); INA International Investors, Ltd. (Pennsylvania); La Nouvelle, S.A. (France); Paine Webber Incorporated (Delaware) and its seventy-four (74) subsidiaries and affiliates; and Societe Civile Immobiliere Turina (France).

In addition to the foregoing, the parent companies of Insurance Company of North America have varying ownership interests in over three hundred and seventy-six (376) other insurance, insurance-related, health care, real estate, and investment companies, both domestic and foreign, including Connecticut General Corporation and its subsidiaries and affiliates. Should the Court desire listings of these companies, and of the subsidiaries and affiliates of Paine Webber Incorporated, Insurance Company of North America will supplement its listing.

The Nettleship Company of Los Angeles

The Nettleship Company of Los Angeles was acquired by the Frank B. Hall Co. in 1973 and as part of that transaction was dissolved.

Sentry Insurance A Mutual Company

Sentry Insurance A Mutual Company has no subsidiaries (except wholly-owned) and no affiliates. The current respondent was formerly Sentry Insurance and Hardware Mutual Casualty Company.

North American Reinsurance Corporation

North American Reinsurance Corporation is owned by Swissre Holding (N.A.) Inc., New York, New York, which is owned by Swissre Holding Ltd., Zurich, which is owned by Swiss Reinsurance Corporation, Zurich. North American Reinsurance Corporation has no subsidiaries. Affiliated companies are: F & D Holding Corp. (Delaware); Fidelity & Deposit Company (Maryland); Fidelity & Deposit Company of Maryland (Maryland); NARe Life Mgmt. Co. Inc. (New York); North American Reassurance Company (New York); SR Geothermal Inc. (Delaware); Swiss-Am Reassurance Company; Swiss Reinsurance Co. (N.A.) Inc. (New York); Swissre Advisers, Inc. (New York); Swissre Corp. (New York); Swissre Life Insurance Company; Swissre Management Corporation; "Switzerland" General Ins. Co. Ltd. of Zurich (Switzerland); Switzerland Gen. Ins. Corp. of New York (New York); and Tudor Insurance Co. (New Hampshire).

American Re-Insurance Company

American Re-Insurance Company is a wholly-owned subsidiary of Aetna Life and Casualty, a Connecticut corporation. The following companies are subsidiaries of American Re-Insurance Company: American Excess Insurance Company (Delaware); A. M. Re Brokers, Inc. (Delaware); Am. Re. Managers of Texas, Inc. (Texas); and American Independent Reinsurance Company (Delaware).